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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 445

ANTHONY PETER RIELA,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

This is a motion pursuant to Rule 16 of the Revised Rules of this Court to dismiss an appeal from an order of the New York Court of Appeals, dated April 21, 1960, which unanimously upheld appellant's conviction for criminal contempt of the Grand Jury of Tioga County, New York, under Section 600 (6) of the New York Penal Law, for unlawfully refusing to answer the Grand Jury's inquiries concerning the so-

called "Apalachin Meeting." Appellant's conviction previously was affirmed unanimously by the Appellate Division, Third Department, of the New York Supreme Court, on January 8, 1960 (1345-1350).*

On October 24, 1958, sitting without a jury, the Tioga County Court, *Clohessy, J.*, entered a judgment of conviction against appellant (109-118); trial had been held in Tioga County on September 30th and October 1st, 2nd and 3rd, 1958. The original judgment sentenced appellant to sixty days in jail on each of seventeen separate counts of criminal contempt, all terms to run concurrently, and fined him $250.00 on each count for a total fine of $4,250.00 (116-117). While affirming appellant's conviction, the Court of Appeals held his contemptuous conduct during his appearance before the Grand Jury constituted but one single contempt and therefore directed that appellant be resentenced and a new judgment of conviction entered (Jurisdictional Statement, Appendix A, p. 3a). The County Court subsequently resentenced appellant for the one crime of criminal contempt to sixty days imprisonment and a fine of $250.00 (Jur. State., App. F). It is from this new judgment, entered on July 12, 1960, that appellant has attempted to perfect both this appeal as of right and simultaneously petition this Court for a writ of certiorari (See also No. 460, October Term, 1960).

On July 8, 1960, the Court of Appeals denied appellant's motion for re-argument, 8 N.Y. 2d 1011 (1960); it also amended the remittitur, 8 N.Y. 2d

* Numerals in parentheses refer to folio numbers in the record on appeal to the Court of Appeals.

1008 (1960), as requested by appellant, so as to restate the federal questions considered by that Court (See Jur. State., App. B and C).

Appendices attached to the People's brief in opposition to the petition for a writ of certiorari set forth pertinent documents omitted from the record on appeal.

The New York State Commission of Investigation assisted the District Attorney of Tioga County in the preparation of this brief pursuant to his request under the provisions of Section 2(4), Chapter 989 of the New York Laws of 1958; Section 7052(4), McKinney's Unconsolidated Laws of New York, which reads:

> "Upon request of district attorneys and other law enforcement officers, the commission shall cooperate with, advise and assist them in the performance of their official powers and duties."

The Opinions Below

The opinion of Judge Fuld on behalf of the Court of Appeals is reported at 7 N.Y. 2d 571, 200 N.Y.S. 2d 43 (1960), and the opinion of Mr. Justice Coon on behalf of the Appellate Division, Third Department, is reported at 9 A.D. 2d 481, 195 N.Y.S. 2d 558 (1959) (1366-1389). The opinion of the Tioga County Court, *Clohessy, J.*, is reported at 14 Misc. 2d 213, 178 N.Y.S. 2d 873 (1958) (1288-1337). Each of these opinions is set out in appellant's, Jur. State., Appendices A, D, and E, respectively.

The Constitutional Provision and Statutes Involved

The only constitutional provision cited by appellant is the Fourteenth Amendment to the United States Constitution.

The pertinent statutory provisions not quoted in this motion are set forth in appellant's Jur. State., Appendix H.

The Facts

On November 14, 1957, the New York State Police reported stopping and questioning at the premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who resided in various sections of this country and abroad. Appellant, a claimed resident of New Jersey, was among this group (394-395).

The circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location on a Thursday in November—indicated extensive planning and unity of purpose. The meeting attracted extraordinary attention. The Grand Jury of Tioga County, *the location of this event*, initiated an investigation shortly thereafter to determine whether any crimes had been planned or committed in connection with that meeting (389-391, 403).

The Grand Jury was particularly concerned with possible violation of the laws against criminal conspiracies, bribery of public officials, and monopoly and restraint of trade (12, 389-391, 409, 493).

Accordingly, pursuant to Section 618-a of the Code of Criminal Procedure, the New York enactment of the Uniform Reciprocal Witness Act, a certificate was obtained from the Tioga County Court stating appellant was a "material and necessary" witness in the Grand Jury's investigation (App. to People's brief in opp. to petition for cert.). A hearing thereafter was held in the Essex County Superior Court of New Jersey, where appellant apparently resided, and the usual form of subpoena-order subsequently issued directing appellant's appearance before the Tioga County Grand Jury (App. to People's brief in opp. to petition for cert.). After issuance of this subpoena appellant chose to appear voluntarily before the Grand Jury (130-141).

Upon appearance on February 25, 1958, appellant exercised his privilege against self-incrimination as to seventeen questions directed to him by the Grand Jury concerning the meeting at Barbara's (214-222). The Grand Jury then voted to confer and did confer immunity upon appellant at the request of the District Attorney (222-226). Appellant was informed immunity was conferred under the authority of Section 2447 of the Penal Law, and further told the meaning and scope of that conferral; he was clearly warned that failure to respond after immunity was conferred might result in contempt proceedings such as this very case (227-230).

The first question to appellant was then repeated and again he refused to answer (230). The Foreman of the Grand Jury, upon request of the District Attorney, then directed appellant to answer the question (231). Appellant continued to refuse to answer

that question and the following sixteen questions, although directed to do so as to every question (231-254). In each instance his refusal took the form of claiming his privilege against self-incrimination even though immunity had been conferred upon him (231-254).

Counsel to appellant accompanied him to Tioga County for this appearance and was available outside the grand jury room during his direct refusals to respond to any questions concerning the Apalachin meeting (228-230).

The Grand Jury then indicted appellant under Section 600(6) of the Penal Law for criminal contempt (10-82). The seventeen counts in the indictment represented refusal of appellant to answer each of the seventeen questions put to him before the Grand Jury on February 25, 1958 (10-82).

As noted, a judgment of conviction was entered on October 24, 1958 after trial without a jury (109-118).

ARGUMENT

POINT I

Appellant has failed to show the New York Statutes he now claims are repugnant to the United States Constitution were so challenged and necessarily passed upon below and, therefore, he cannot meet the jurisdictional requirements for appeal as of right.

Appeal to this Court as a matter of right is based upon Title 28, United States Code, Section 1257(2) which reads in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity".

Section 1257(2) has been construed strictly to reject asserted jurisdiction in the absence of a clear and explicit demonstration by the appellant that in the state courts he challenged the validity of a statute as repugnant to the United States Constitution, treaties or laws; that the state courts passed upon such challenge of repugnance; that the state courts rejected the challenge of repugnance and ruled in favor of validity of the statute. *Charlestown Federal Savings &*

Loan Assoc. v. *Alderson*, 324 U.S. 182 (1945); *Jett Bros. Distilling Co.* v. *City of Carrollton*, 252 U.S. 1 (1920); *Mergenthaler Linotype Co.* v. *Davis, et al.*, 251 U.S. 256 (1920).

Jurisdiction under Title 28, United States Code, Section 1257 (3) (for a writ of certiorari) requires only alleged denial by the state court of an asserted federal right, as contrasted with the strict requirements of Section 1257(2) for appeal as of right. A prior challenge of a state statute as repugnant to federal law is unnecessary under Section 1257 (3). Thus litigants are not cut off arbitrarily from an approach to this Court, and the Court gains necessary flexibility to consider a greater number of applications in its discretion. It is not enough for appellant simply to state jurisdiction lies as of right and make a citation to the United States Constitution.

Yet nowhere in his Jurisdictional Statement does appellant challenge a state statute as repugnant to federal law, as he must. Nor does the opinion of the New York Court of Appeals, or its original or amended remittitur, reflect such a challenge.

The amended remittitur merely states appellant claims "... the application in his case of §2447 of the Penal Law and §618-a of the Code of Criminal Procedure violated his rights under the Fourteenth Amendment of the Federal Constitution" (Jur. State. p. 9a). No jurisdiction for appeal as of right under Section 1257 (2) is conveyed by this claim, as discussed above.

Also, appellant makes no argument, and he could not do so, that the *application* of those two State stat-

utes make both statutes *void* under federal law. Indeed, the remittitur is silent as to appellant's specific claim regarding those statutes. Cf. *Live Oak Water Users Ass'n. v. R.R. Comm. of California*, 269 U.S. 354 (1926). Appellant's argument, however, is directed solely toward an alleged deprivation of his rights under the due process clause of the Fourteenth Amendment (Jur. State. p.15). In other words, appellant argues that these two State statutes, which have been upheld by the highest State court, as applied denied him due process of law, but he does not argue they are void under federal law. See Stern & Gressman, *Supreme Court Practice* 58 (2d Ed. 1954).

Moreover, it is significant appellant does not claim *either* statute (Section 2447, Penal Law or Section 618a, Code of Criminal Procedure) repugnant to federal law; rather, he claims the peculiar effect of the "joint application" of both is to deprive him of federal rights. This theory fails to meet the requirements of Section 1257(2) in that it does not even purport to challenge the constitutionality of either statute.

Under these circumstances, review can only be on writ of certiorari. In his petition for such a writ, appellant can properly address to the Court's discretion the factors he claims deprived him of "due process".

POINT II

In any case, the alleged federal questions are not substantial or worthy of consideration by this Court.

At one or another place in his Jurisdictional Statement appellant raises a large number of alleged federal questions. They are not significant or substantial, and simply restate the same allegations and arguments scattered throughout appellant's brief in varying combinations of language. Surely they do not warrant the attention of this Court. Should this Court find no jurisdiction for appeal as of right, it should also refuse to grant certiorari because of the lack of substance in appellant's contentions.

Since appellant's petition for a writ of certiorari contains these identical allegations as well, in the interests of economy the specific discussion of each is set forth in the People's brief in opposition to that petition (No. 460, October Term, 1960).

Conclusion

Appellant has failed to satisfy the essential jurisdictional requirements of Title 28, United States Code, Section 1257 (2), and this appeal should be dismissed.

In any case, no substantial federal question worthy of consideration by this Court has been adequately raised, and the appeal should be dismissed. In the alternative, if jurisdiction for appeal is found the

decision of the New York Court of Appeals should be affirmed in all respects.

Should this appeal be treated as a petition for a writ of certiorari, the petition should be dismissed.

Respectfully submitted,

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